IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRIMINAL APPEAL No.666 of 2001

E.Kuppusamy ..Appellant/Petitioner/Complainant

-vs-

R.Kannaiyan ..Respondent/Accused

This appeal has been filed against the order made in C.C.No.328 of 2000 dated 19.06.2001 on the file of the Judicial Magistrate No.1, Erode.

For appellant :: Mr.T.Murugamanickam

For respondent :: Mr.K.Mahesh

JUDGMENT

This appeal has been preferred by the complainant in C.C.No.328 of 2000 on the file of the Judicial Magistrate No.1, Erode,against the order passed by the learned Judicial Magistrate dismissing the complaint on the ground that the complainant was not present in the Court on 19.6.2001,acquitting the accused under Section 256(1) of Cr.P.C.

2. Heard Mr.T.Muruga Manickam, learned counsel appearing for the appellant who would contend that the case was posted on 23.4.2001, on that day, the complainant was present, but the accused in spite of service of summons, has not appeared and hence the learned Judicial Magistrate has issued Non bailable warrant for apprehending the accused and that the non bailable warrant remains unexecuted from 20.10.2000 to 19.6.2001, the date on which the order under challenge in this appeal was passed.

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3.The learned counsel appearing for the appellant relying on a decision reported in Associated Cement Co.,Ltd-vs-Keshvanand (1998)1 Supreme Court Cases 687) would contend that for the non appearance of the complainant, the complaint cannot be dismissed. The relevant observation in the above said dictum runs as follows:

> "Reading Section 247 of the Criminal Procedure Code,1898(Section 256 of new Code) in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section . The first is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the court must consider whether personal appearance of the complainant is essential on that day for the progress of the another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss, the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal Justice".

4. The learned counsel would represent that on the date of passing of the order under challenge on 19.6.2001, the presence of the complainant is not necessary because the accused was also not produced by executing Non Bailable Warrant. Further in the memorandum of appeal itself, it has been clearly stated that the case was adjourned from 23.4.2001 to 3.7.2001. But it was wrongly called in the Court on 7.5.2001 on which date, both the complainant and the accused were absent. Under such circumstances, I am of the view that an opportunity must be given to the appellant to pursue his complaint before the trial Court.

5.In fine, the appeal is allowed and the order passed by the learned Judicial Magistrate No.1, Erode in C.C.No.328 of 2000 is set aside. The learned trial Judge is directed to restore C.C.No.328 of 2000 on his file

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and after securing the accused shall proceed with the trial. It is further represented by the learned counsel that the accused has been secured on24.6.2001 subsequent to the order passed and produced before the Court. If it is so, once again, the summons must be sent to the accused on payment of necessary process fee. The learned trial Judge is directed to secure the accused at an early date and dispose of C.C.No.328 of 2000 within two months from the date of appearance of the accused.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg

To

1. The Judicial Magistrate No.1, Erode

2. -do- through the Chief Judicial Magistrate,Erode.

1 cc To Mr.K.Magesh, Advocate, SR.41866.
1 cc To Mr.T.Murugamanickkam, Advocate, SR.41743.

Crl.A.No.666/2001

AD(CO)
RVL 19.07.2007

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